

## **FY 2020-2021 National Program (NP) Guidance: Early Engagement Questions for State & Tribal Partners (updated 8/8/18)**

Consistent with the Agency's Strategic Plan and the Interim Guidance, EPA's enforcement priorities remain focused on addressing the most significant violations consistent with EPA's statutory authorities. For states and tribes with authorized programs, EPA, states, and tribes share enforcement responsibility, with primary enforcement responsibility residing with the state<sup>1</sup> or tribe. Further, EPA is responsible for addressing violations that occur in Indian country in the absence of an approved program. Even in states or tribes authorized to implement a program, EPA serves a critical role in addressing serious national noncompliance problems, such as those affecting multiple states or tribes, and in serving as a backstop for instances when a state or tribe does not timely or appropriately address serious noncompliance.

EPA is seeking early input from state and tribal partners on the upcoming FY 2020-2021 National Program Guidance. As part of that effort, EPA's enforcement and compliance assurance program is seeking specific feedback in the following areas:

### **Shared Goals and Priorities:**

- 1. In the FY 2018-2022 EPA Strategic Plan, OECA has two strategic measures, (1) reduce the average time from violation identification to correction and (2) increase the environmental compliance rate. The Strategic Plan provides a list of strategic objectives to support these measures (e.g., 2.1—Enhanced Shared Accountability and 3.1—Compliance with the Law). In addition, OECA also works with other national programs offices to implement their compliance-related strategic measures and priorities (see table below). What assistance do states and tribes need from EPA to accomplish these shared goals and priorities?**

**Table: Agency Strategic Plan Measures (SM) & Priorities Related to National Compliance**

**SM-1:** Reduce the number of nonattainment areas

**SM-2:** Reduce the number of community water systems out of compliance with health-based standards [drinking water]

**SM-4:** Reduce the number of square miles of watershed with surface water not meeting standards [impaired waters]

**SM-17:** Reduce the average time from violation identification to correction

**SM-18:** Increase the environmental law compliance rate.

**Strategic Plan:** "With our partners, we will pay particular attention to vulnerable populations." (p.7)

**Federal Lead Strategy:** Our mission "is to improve the health of children...by eliminating or reducing lead exposure and associated health impacts." (p.1)

South Dakota recommends that EPA and States agree to the following concepts in regards to the strategic measures:

<sup>1</sup> See e.g., ECOS Resolution 98-9, U.S. EPA Enforcement in Delegated States (revised September 28, 2016), describing the EPA and state roles in enforcement in authorized states: "WHEREAS, U.S. EPA and the States have bilaterally developed policy agreements which reflect those roles and which recognize the primary responsibility for enforcement action resides with the States, with U.S. EPA taking enforcement action principally where the State requests assistance, is unwilling or unable to take timely and appropriate enforcement actions, or in actions of national interest, or in actions involving multiple state jurisdictions."

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1) Clarify the meaning for “reduce the average time from violation identification to correction”. South Dakota believes EPA’s Compliance Program should focus on achieving and maintaining compliance instead of how many enforcement actions are taken or how much of a penalty EPA receives. Since protecting the environment is the major goal, the time duration component should focus on the time period it takes EPA/states to bring the facility back into compliance and not the time period it takes EPA/state to conduct an enforcement action.

2) In addition, EPA should clarify the types of violations associated with EPA’s proposed goal to increase the environmental compliance rate. EPA has developed several policy documents on different types of violations. Several of the violations covered by those policies have no direct impact on the environment such as record keeping and reporting violations. South Dakota believes the emphasis should be on those violations that impact the environment with the priority for those violations that impact the goal of meeting or maintaining the National Ambient Air Quality Standards and not those bureaucratic red tape type violations.

3) South Dakota also suggests when EPA revisits, reviews, or drafts new rules that the actual rules are readily understood by the general public and not just someone with a law degree. If a rule has a gray area, it should be rewritten to clarify the meaning in the rule and not through policy or an enforcement action. In an EPA compliance training seminar, an attorney for EPA made the comment that in his opinion, if a person had to have several sticky notes or use more than a two fingers holding pages in deciphering a regulation, that regulation was not federally enforceable.

**2. Are there any other shared goals/priorities/strategies that EPA should identify in the FY 2020-2021 NP Guidance and how can we best achieve them together?**

South Dakota believes compliance with state and federal regulations is what protects the environment; not heavy handed enforcement. As recommended above, EPA should consider a proactive strategy of having more of an emphasis on compliance presence in the field. South Dakota inspects all of its facilities with Title V air quality operating permits annually and those that take federally enforceable conditions to avoid Title V air quality operating permits or Prevention of Significant Deterioration preconstruction permits every other year. With that constant presence and working with facilities on staying in compliance with state and federal regulation, South Dakota has consistently achieved compliance rates greater than 95%.

**Measures of Success:**

**3. OECA will use the strategic objectives and measures as well as our annual budget measures (pgs. 617 and 620-622 in FY 2019 Congressional Justification) to assess our progress and evaluate whether we have achieved our shared goals. In addition to the two enforcement strategic measures (see above in Question 1), OECA will prioritize activities that contribute toward the compliance-related strategic measures and priorities that are related to the above table. Do states and tribes have suggestions for additional ways in which we should measure our effectiveness or define success?**

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Background: To accomplish these goals, EPA recognizes that (1) among EPA, states, and tribes, joint governance and shared accountability are key principles and, (2) increased compliance requires a broad range of compliance assurance tools to be available for use.

EPA's emphasis on enforcement and not compliance is reflected in its performance metrics. By developing targets on how many enforcement actions are conducted or how many tons of pollutants are reduced by enforcement actions, EPA takes a position of being heavy handed or overly burdensome. South Dakota's experience of working cooperatively or emphasizing compliance instead of enforcement has resulted in high compliance rates with state and federal regulations which in turn relates to a healthier environment. This is reflected in South Dakota being in attainment with EPA's National Ambient Air Quality Standards. EPA's performance metrics should be related more to achieving and maintaining compliance.

**Assistance and Flexibilities:**

**4. What financial, administrative, and/or programmatic flexibilities or other assistance are needed to carry out our shared goals/strategies?**

South Dakota's frequent presence in the field helps the regulated community comply with state and federal regulations, minimizes violation occurrences, results in higher compliance rates, and in turn maintains a cleaner environment. EPA needs to provide sufficient funds to ensure states can maintain a compliance presence in the field. In addition, if EPA proposes any additional compliance workload(s), EPA needs to provide additional funding or reduce the existing workload(s). States have limited resources and cannot maintain a compliance presence if additional requirements are expected for the same amount of funding when additional duties are required. For perspective, South Dakota has less than 20 full time equivalents in its Air Quality Program. These devoted employees work on all aspects of the Air Quality Program such as air quality permitting, compliance, monitoring, regional haze, emission inventories, etc.